

**AUTO CASES: THEY ARE NOT WHAT THEY USED TO BE.
TEN TIPS FROM START TO FINISH FOR HANDLING AN AUTO COLLISION
CASE.**

The process and manner in which we prepare and try the typical auto collision case has significantly changed over the past years. Gone are the days when you could merely collect a few records, send a demand letter, and then receive a satisfactory result for your client. Now, the lawyer who handles auto collision cases must meet a number of issues and obstacles such as liens, subrogation rights, ERISA, jury attitudes and bias, and the onslaught of corporate and insurance influence, and at the same time maximize damages in an era of jury suspicion and distrust of auto cases and the lawyers who try them. If the case is tried, jurors are skeptical, and even if they believe someone is injured, they may fear a fair and reasonable verdict will somehow raise their own insurance. They are truly hard cases especially when little physical damage to the car exists and the injuries involve connective tissue. All of this has made handling a simple collision case cost more, take more time, and require more thought and preparation than it used to.

The following are ten tips for handling such a case from start to finish in hopes of bringing a satisfactory result for your client.

1. Client Interview. The initial client interview is the most important part of handling a car collision case. Because it is at this point that we meet the client and start to make the decision as to whether we will accept the case. Frequently trial lawyers are optimists and idealists who generally see the best in people. We are likely to

forgive people for their weaknesses. While these are great character traits, it is crucial to maintain an objective view of the client and see the clients as they are, and not as they might be in a perfect world. Potential problem clients tend to come to the surface from the outset. They are the ones who shop from lawyer to lawyer, those who think they have a great case, who demand to know how much they will get or what their case is worth, or are in need of immediate money. Beware of those that come in right before the statute of limitations runs and have been to several lawyers, and insist that their case is “not about money; it is about principle.” Don’t forget your initial feeling when meeting a prospective client. A juror may have the same impression that you do.

The initial meeting should be conducted by the attorney in the attorney’s office, if possible, although sometimes that is not always possible. This is a confidence builder for the prospective client and a chance to develop rapport with the client from the outset. During the client interview you will need to develop the facts from the standpoint of liability and the extent of your client’s damages. Be sure to find out how the collision occurred, who was there, what was seen, and what happened to their body during the collision. What parts of their body were hurt, what treatment was provided,

and how this has affected their life? Go over with the client what a typical day is like for them.

2. Investigate. Haven't we all at some point looked back and said "Why did I ever take this case?" While there are no guarantees in accepting any case, one of the best ways to insure that doesn't happen is to diligently investigate the case before the matter is accepted and suit is filed. Early and thorough investigation is always worth the time, trouble and expense. You can discover weaknesses, flaws, and unreliable clients that you should avoid. It is also critical in preserving evidence that would otherwise be lost or discarded. You should photograph and document the scene of the collision and the condition of the vehicle after the impact. A visit to the accident scene can help clarify the facts for you and provide an understanding of the physical layout of the collision scene without spending time guessing and chasing unsubstantiated theories. Order and examine the police officer's report and any supplemental report(s). Obtain the driving record on your own client and on the defendant. Go to the scene on the same day and at the same time the collision occurred. Take the same route the client may have taken and take plenty of photographs. Talk to the witnesses listed on the report as soon as possible and take them to the scene if necessary. A good investigation should reveal the strengths and weaknesses of the case and of your client. Investigate the

damages your client suffered. Go to their home; see how they conduct their daily activities, and how the injuries affect them. Obtain photographs of the client prior to the injury and after.

It is often said, it is the cases that are rejected that make a successful plaintiff's practice. Be sure through a thorough investigation that you know what kind of case you are taking.

3. Theme development. Every case, no matter how small (and remember there is no such thing as a small case), needs a theme. A theme is nothing more than a short and simple statement as to what your case is about, said in a simple way that is easily communicated to someone who knows nothing about your case. It must be easily understood and related to a general life experience. Being able to reduce your case to 10 words or less is critical in developing a theme that is clear and simple and conveys the message of your case and the action you are undertaking. Develop the theme early in your case from the moment you first meet your client and continue it through the interview stage and continue it throughout the entire case presentation. The theme should be evident in your demand, discovery, and entire case presentation.
4. Obtain complete medical and insurance records of your client. In order to effectively pursue your case and your client's claim for damages you will need to know all there is about your client.

Obtaining the complete medical records of your client is essential. It provides you the information on your client's injuries and also establishes your claim for damages. Recent changes in the law of obtaining medical records must be considered so that any authorizations you use to obtain your client's medical records must be in compliance with HIPAA requirements and be accepted by the medical provider. A list of all providers that your client has been to following the collision is essential and an examination of those records to see if there is prior medical care and treatment that had been provided to your client relating to the injuries complained of in this claim. It is important and crucial that you obtain the complete medical history of your client before you begin to negotiate and certainly before suit is filed. Nothing is more unnerving than to appear at a deposition and have a defense attorney read or refer to records on your client that relate to past medical care and treatment that you were not aware of. Have your client complete a client information form with a list of all prior medical care and treatment they have had. Any prior injuries to their neck or back or connective tissue, any prior worker's compensation claims, any prior falls, or other accidents, are all essential to obtaining the complete medical history of your client.

When medical records are obtained, they need to be organized and then categorized by provider with dates of service. This is essential

to outline the medical treatment and damages your client has sustained and should be organized so it can be presented in an organized manner to an adjuster and/or defense attorney.

Liens are very common in even the smallest collision case. Liens from medical providers, claims of subrogation by health care providers, ERISA claims, Medicare and Medicaid reimbursement are issues that ultimately will have to be addressed before your case is ready to be resolved. Knowing all those issues as early as possible is essential in being able to negotiate and know exactly what may have to be paid out of any settlement or judgment.

You need to know the full extent of your client's health insurance. Examine their benefit package. What does it say about the coverage provided? If it is an ERISA plan, request the plan documents from the provider and verify that it is an ERISA plan.

You also need to obtain information on your client's own auto insurance coverage. What type of coverage did they have on all the vehicles they owned at the time of the collision? Did they have medical pay coverage? Is there a potential underinsurance motorist claim? Complete information on your client's own health and auto insurance is important. Don't wait until you start discussing settlement to address issues of ERISA, subrogation claims or whether Medicare or Medicaid was involved in payment of any medical bills relating to your client's care. Identifying if those

sources did provide payment, and if they did, then notifying those entities to see what amounts they claim were paid out, is essential before you can begin to settle the case.

5. Discovery. In the discovery stage of your case, it is important to have a discovery plan. A discovery plan is nothing more than your plan for what facts you are trying to prove, how you are going to prove them, and what documents or witnesses you will need to prove those facts.

For the deposition of the defendant, gather as much information as possible about the collision and Defendant before the deposition. Then in the deposition, you need to set the tone and use your discovery plan to get from the Defendant what you need to help your case. For the deposition of the plaintiff – prepare, prepare and prepare. Both you and the client need to be fully prepared. Be sure the client knows what a deposition is and the reason for the deposition. Preparation of the lawyer and the plaintiff for the deposition is highly important and cannot be underestimated. The plaintiff's deposition is the most important aspect of the typical auto collision case. Prepare for it.

6. Damages. Obtaining fair damages in a car collision case with connective tissue injuries in today's environment of jury bias and attitude requires great thought and preparation. The ability to dispel jury biases of frivolous lawsuits, runaway excessive verdicts,

and no damage-no injury cases in a climate of distrust and speculation, is an ongoing process. It needs to be developed from the theme selection through the entire case presentation. The use of lay witnesses can be very effective in establishing your client's damages. As no one likes a plaintiff who whines, use the lay witness to establish the pain and discomfort the client has endured. Explain to lay witnesses the trial process and answer questions they may have. Ask witnesses about the plaintiff's activities, hobbies, and dispositions before the car accident and after and the plaintiff's present complaints and disability. Assure lay witnesses that they generally will be on the witness stand fifteen minutes or less. These witnesses can be very effective in conveying the plaintiff's damages to the jury and keep the plaintiff from testifying to great length about their complaints.

Establishing the full measure of fair damages in today's climate is difficult. One must use many sources to give an adjustor or a juror a reason for paying money to the plaintiff. Tangible damages like medical bills and lost wages are easier for jurors to relate to and accept. It is the intangible damages such as pain and suffering and loss of life's enjoyment that require skill and thought to establish and to get the jury to award.

7. Medical Treatment. The treating doctor is the key in proving the medical damages of your case. While lay witnesses and the client

can lay the foundation, it is the medical doctor that must be able to bring the medical and damage case together to show the plaintiff's injury was caused by the defendant's conduct. Arrange for a conference at the treating doctor's office at least one to two weeks prior to their deposition or trial date. Provide the doctor all the medical records on your client before the deposition. Have the client see the doctor one more time before the deposition. It can be helpful to have your client at the deposition. Don't let the treating doctor be taken by surprise in his deposition. Knowing the complete medical history of the plaintiff and understanding the issues of causation is essential in making the doctor an effective presenter of your client's damages.

8. The Defense medical exam. Know from the onset that this is not an independent medical exam the defendant is requesting. Make sure your client understands the importance of the exam and the role of the defendant medical expert. See that they remember how much time was involved, and the amount spent by the doctor on the examination. What was the extent of the examination, what did he do, how thorough was the exam? On cross examination of the defense medical expert, establish their relationship to the defendant, the amount of money received, the number of exams they performed, and that no treatment was provided. Other bias

and interest of the examiner are important to bring out on cross examination.

Again remember there is nothing independent about the exam or the examiner. In preparing for the defense medical doctor's deposition, you need to know the history of your case and your client, the medical treatises and literature, and the doctor's qualifications. Research the defense expert; look at their curriculum vitae, their staff privileges, association memberships, and current status of their practice. Use the Internet to research the expert and talk to colleagues that may have run into such expert before. Discover how many times the expert has testified for the insurance company or for this law firm. Attack the foundation of his opinions and look at the percentage of time he testifies for defendants. What is his fee for the report, for the exam, and for the deposition or trial testimony? Be careful when questioning the expert and do not give him a chance to repeat the direct examination on cross. Have a plan to get the answers you need and then use them in summation. Remember that this doctor did not provide any treatment and was not referred by another doctor for a second opinion. He was obtained by a lawyer for an examination the purpose of which was not to provide any treatment. He only saw the Plaintiff once, and frequently, it was a considerable time after the initial injury. See if they will admit that the treating

doctor is a competent physician and that the treating doctor treated and observed the Plaintiff over a long period of time.

9. Prepare. There is no substitute for hard work performed in a consistent manner. It is safe to say that 99% of the secret of all success with auto cases is through preparation and hard work. Taking the time to prepare each element of the case is essential to bring about the best result for your client. Reading the police report, preparing for your client's deposition, preparing a discovery plan, and using it in the depositions of the defendant and witnesses are essential to the case presentation. Knowing the medical records and your client's medical history and injuries, thoroughly preparing your expert witness in the event a deposition is taken, and being thoroughly prepared when you cross examine the defense expert, will provide successful results.
10. Alternative Dispute Resolutions/Trial. Many cases are now referred to mediation or other types of alternative dispute resolution prior to trial. Your role as an advocate does not change if the case is mediated as opposed to the case going to trial. You have the same needs for theme presentation and preparation that you would have if the case would go to trial. In mediation, this is a chance to present your case to a mediator and/or adjustor the same way that one would present it if it went to trial. Being prepared and presenting a case with a simple theme in an organized manner will

generally produce the intended result. Being a good lawyer and presenting a successful case depends upon your ability to be yourself. Like a poet, author or actor, a trial lawyer must find their own voice, and you need to be that person. Pretending to be someone else reeks of insincerity and shows through.

Successfully presenting an auto collision case involves hard work, thought and skill. You will have to overcome many obstacles and counter the ongoing bias and public suspicion of the typical auto collision case. Don't give up. These cases can be won and pursued successfully by the prepared and organized advocate.

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